No. 89-700

In the Supreme Court of the United States

OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, PETITIONER

v.

SHURBERG BROADCASTING OF HARTFORD, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission's minority distress sale policy, which permits a limited category of licenses to be transferred only to minority-controlled firms, violates the equal protection component of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-112a) is reported at 876 F.2d 902; the orders and opinions filed on the denial of the petition for rehearing and suggestion of rehearing en banc (Pet. App. 143a-154a; *id.* at 155a-160a) are reported at 876 F.2d 953 and 876 F.2d 958, respectively. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 113a-129a) is reported at 99 F.C.C.2d 1164.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1989. A petition for rehearing was denied on

June 16, 1989 (Pet. App. 143a-144a). By an order dated September 13, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 29, 1989. The petition for a writ of certiorari was filed on October 30, 1989 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Background

1. *Distress Sale Program*

In the Communications Act of 1934, Congress assigned to the Federal Communications Commission the exclusive authority to grant, and oversee the transfer of, licenses to build and operate radio and television stations in the United States. See 47 U.S.C. 151, 301, 303, 307. The FCC generally prohibits a television or radio broadcast licensee, whose license has been designated for a revocation hearing, or whose renewal application has been scheduled for a qualification hearing, from assigning or transferring that license until the Commission has determined that the licensee remains qualified to hold the authorization. See, *e.g., Northland Television, Inc.*, 42 Rad. Reg.2d (P & F) 1107, 1110 (1978); see also Pet. App. 4a-5a. In 1978, as part of its efforts "to further encourage broadcasters to seek out minority purchasers," *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 983 (1978) [hereinafter *1978 Policy Statement*], the FCC instituted the minority distress sale program. That program

> permit[s] licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualification issues * * *, to transfer or assign their licenses at a "distress sale" price to applicants with a significant minority ownership interest, assuming the proposed assignee or transferee meets other qualifications.

Ibid. (footnote omitted).

Under the distress sale program, a qualified minority applicant is one that meets the Commission's basic qualifications and in which the minority ownership interest exceeds 50% or is controlling. See *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 853 (1982).[1] The distress sale price, to receive Commission approval, must be no higher than 75% of the combined fair market value of the station and license. See *Grayson Enterprises, Inc.*, 47 Rad. Reg.2d (P & F) 287, 293 (1980).[2]

2. *Development of the FCC's Minority Ownership Policies*

Until the 1970s, the Commission had taken relatively few formal steps that departed from its policy of selecting applicants for radio and television broadcast licenses on the basis of race-neutral criteria. See generally *Policy Statement on Comparative Broadcast Hearings*, 1

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[1] The FCC has implemented a different rule with respect to an applicant organized as a limited partnership: if there is a general partner who is a minority with a 20% interest in the partnership, and who will exercise "complete control over [a] station's affairs," that partnership qualifies as one with "significant minority involvement." *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 855 (1982).

[2] From fiscal years 1979 through 1987, the FCC has approved only 38 distress sales. During that same period, the Commission approved a total of approximately 9,000 sales of broadcast stations. Thus, distress sales have accounted for 0.4% of all broadcast station sales during that nine-year period. See FCC C.A. Pet. for Rehearing and Suggestion for Rehearing En Banc 11-12; see also Pet. 14.

F.C.C.2d 393 (1965).[3] In 1973, however, the District of Columbia Circuit concluded that there was a dearth of minorities in broadcasting and that promoting greater minority ownership in the broadcasting industry would foster program diversity. The court of appeals therefore directed the Commission to give some "favorable consideration" to an applicant who proposes to include racial minorities among its owners who will participate in managing the station. *TV 9, Inc.* v. *FCC*, 495 F.2d 929, 937 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974); see *id.* at 935-938; *id.* at 941-942 (supplemental opinion of Fahy, J.).[4] Accord *Garrett* v. *FCC*, 513 F.2d 1056, 1062-1063 (D.C. Cir. 1975).[5]

As a result of the *TV 9* and *Garrett* decisions, together with its own studies, see, *e.g.*, *1978 Policy Statement*,

[3] During the late 1960s, the FCC had addressed the problem of racial discrimination in licensees' employment practices. See generally *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969).

[4] The court of appeals stated that

> when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded. The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of views.

495 F.2d at 938 (footnotes omitted).

[5] The *Garrett* court stated that "[t]he entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that that 'reasonable expectation,' without 'advance demonstration,' gives them relevance." 513 F.2d at 1063 (footnotes omitted).

68 F.C.C.2d at 980-981; Minority Ownership Task Force, FCC, *Report on Minority Ownership in Broadcasting* 1-3, 8-12, 30-31 (1978) [hereinafter *Task Force Report*], the FCC implemented, among other measures, its "distress sale" policy, which permits a limited category of licenses to be transferred only to minority-controlled firms. See *1978 Policy Statement*, 68 F.C.C.2d at 983; see also *Stereo Broadcasters, Inc.* v. *FCC*, 652 F.2d 1026, 1028-1029 (D.C. Cir. 1981). The *Task Force Report* recounted that "[d]espite the fact that minorities constitute approximately 20 percent of the population, they control fewer than *one percent* of the 8500 commercial radio and television[ ] station[s] currently operating in this country." *Task Force Report* at 1 (emphasis in original). The Task Force viewed that "[a]cute underrepresentation of minorities among the owners of broadcast properties [as] troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience," *ibid.*, and found that "[u]nless minorities are encouraged to enter the mainstream of th[is] commercial broadcasting business, a substantial proportion of our citizenry will remain underserved and the larger, nonminority audience will be deprived of the views of minorities," *ibid.*

The FCC credited these findings and, in calling for "broadcasters to seek out minority purchasers" to reduce the lack of minority participation in broadcast ownership, *1978 Policy Statement*, 68 F.C.C.2d at 983, announced its commitment to the view that "[f]ull minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming * * *, [and that] an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum." *Id.* at 981. The Commission explained that because of

> the continuing underrepresentation of minorities in broadcast ownership, and because minority con-

> trolled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation, [the Commission concluded that] full minority participation in the ownership and management of broadcast facilities is essential to realize the fundamental goals of programming diversity and diversification of ownership which are at the heart of the Communications Act and the First Amendment.

Waters Broadcasting Corp., 91 F.C.C.2d at 1264, 1265.[6]

[6] These findings also undergird other FCC policies designed to promote greater minority participation in broadcasting. Since 1978, the FCC has sought to increase minority participation in broadcasting by awarding tax certificates, *i.e.*, incentives, to station owners who sell facilities to minority-controlled applicants. See 26 U.S.C. 1071; *1978 Policy Statement*, 68 F.C.C.2d at 982-983. By statute, Congress has also directed the FCC to use minority preferences in the random assignment of certain low-power stations. See 47 U.S.C. 309(i)(3)(A).

Moreover, along with the distress sale program, the FCC implemented a policy of awarding preferences for minority ownership in comparative proceedings. See *WPIX, Inc.*, 68 F.C.C.2d 381, 411-412 (1978); see also *Waters Broadcasting Corp.*, 91 F.C.C.2d 1260, 1264 & n.13 (1982), aff'd *sub nom. West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985); *1978 Policy Statement*, 68 F.C.C.2d at 981-983. The District of Columbia Circuit recently upheld the constitutionality of the FCC's policy of awarding a qualitative enhancement for minority ownership in comparative licensing proceedings. *Winter Park Communications, Inc.* v. *FCC*, 873 F.2d 347 (D.C. Cir. 1989), petition for cert. pending *sub nom. Metro Broadcasting, Inc.* v. *FCC*, No. 89-453. In a separate submission filed this date, the FCC has opposed the petition for a writ of certiorari filed by the unsuccessful license applicant in that case. We have provided a copy of that brief to counsel for petitioner in this case.

3. *Congressional Oversight of the FCC's Minority Ownership Policies*

In 1982, Congress amended the Communications Act of 1934 to authorize the FCC to award licenses under a random selection system, and directed the FCC, in creating any such lottery procedure, to grant "an additional significant preference * * * to any applicant controlled by a member or members of a minority group." 47 U.S.C. 309(i)(3)(A); see note 6, *supra*. Congress was aware that minorities "traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 44 (1982). Consequently, Congress was of the view that

> [o]ne means of remedying the past economic disadvantage to minorities which has limited their entry into * * * the media of mass communications, while promoting the primary communications policy objective of achieving a greater diversification of the media * * *, is to provide that a significant preference be awarded to mi ority-controlled applicants in FCC licensing proceedings * * *.

Ibid.; see also H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981).

In 1987, in response to the FCC's initiation of inquiry proceedings to reconsider the appropriateness of its policies that seek to promote minority ownership in broadcasting, see pp. 13-14, *infra*, Congress enacted an appropriations provision that prohibited the Commission from spending any appropriated funds "to repeal, to retroactively apply changes in, or to begin or continue a reexamination of" those policies. Continuing Appropriations Act for the Fiscal Year 1988, Pub. L. No. 100-202,

101 Stat. 1329-32. The Senate Appropriations Committee, the author of that prohibition, explained:

> The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority * * * audiences.

S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987). Congress has since extended the prohibition through fiscal year 1989, see Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216-2217, and has recently renewed that extension for the current fiscal year, 1990. See Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020-1021.[7]

[7] On November 21, 1989, the President signed the appropriations provision into law. See also H.R. Conf. Rep. No. 299, 101st Cong., 1st Sess. 64 (1989); 135 Cong. Rec. H7644 (daily ed. Oct. 26, 1989); 135 Cong. Rec. S12,265 (daily ed. Sept. 29, 1989).

In recent years, Congress has continued to oversee the FCC's minority preference programs. See, *e.g.*, *Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. Pt. 1, at 17-19, 75-77 (1987); *Minority-Owned Broadcast Stations—Hearings on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986); *Minority Participation in the Media: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983); *Parity for Minorities in the Media—Hearings on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983). Following the decision in this case, Congress again held hearings to examine the current status of those programs. The Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, held hearings on September 15, 1989, to examine further the issue of minority ownership of broadcast stations. See *Hearing on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation*, 101st Cong., 1st Sess. (Comm. Print Sept. 15, 1989) (unpublished).

B. Proceedings in the Present Case

1. *The FCC's Initial Licensing Proceedings*

a. The FCC's proceedings at issue here involve the broadcast license for Channel 18 (WHCT-TV), Hartford, Connecticut, which was held by Faith Center, Inc. After the Commission had designated Faith Center's license renewal application for a noncomparative hearing,[8] Faith Center, in February 1981, petitioned the Commission for permission to make a distress sale to the Television Corporation of Hartford. The FCC granted that request, *Faith Center, Inc.*, 88 F.C.C.2d 788 (1981), but the proposed sale was not closed. Alan Shurberg, sole owner of Shurberg Broadcasting Company of Hartford, Inc. (collectively "Shurberg"), among others, petitioned the FCC to deny that application. In September 1983, the Commission granted Faith Center's request to pursue a second proposed distress sale to Interstate Media Corporation. *Faith Center, Inc.*, 54 Rad. Reg.2d (P & F) 1286 (1983). See Pet. App. 6a-8a.[9]

[8] In a related proceeding, the Commission had dismissed Faith Center's license renewal application for its television station in San Bernardino, California, because Faith Center had refused to cooperate in the proceeding. See *Faith Center, Inc.*, 82 F.C.C.2d 1 (1980), reconsid. denied, FCC No. 81-235 (May 12, 1981), aff'd mem. sub nom., *Faith Center, Inc.* v. *FCC*, 679 F.2d 261 (D.C. Cir. 1982), cert. denied, 459 U.S. 1203 (1983).

[9] Shurberg sought judicial review of the FCC's order that authorized Faith Center to pursue a second distress sale. The court of appeals dismissed that appeal on ripeness grounds. *Shurberg* v. *FCC*, No. 83-2098 (D.C. Cir. May 24, 1984).

Thereafter, Shurberg, in December 1983, tendered to the FCC an application for a permit to build a television station in Hartford, an application that would be mutually exclusive of Faith Center's pending renewal application for Channel 18. The Commission rejected Shurberg's filing, because the controlling regulations precluded it from accepting applications that competed with designated-for-hearing renewal applications until the resolution of the noncomparative proceedings. See 47 C.F.R. 73.3516(e). Meanwhile, Faith Center and Interstate Media were unable to close the proposed distress sale. As a result of the aborted distress sale to Interstate Media, Faith Center's renewal application automatically reverted to designated-for-hearing status. Pet. App. 8a, 116a-117a.

b. In April 1984, Shurberg requested the Commission to designate his previously filed construction permit application for a comparative hearing with Faith Center's renewal application. In June, however, Faith Center once again sought the Commission's approval to make a distress sale. Faith Center requested permission to sell to petitioner Astroline Communications Company Limited Partnership, "a financially qualified minority applicant [which is] experienced in broadcast operations." J.A. 490. Shurberg opposed the distress sale on a number of grounds, including his contention that the Commission's distress sale program violated his constitutional right to equal protection. Shurberg therefore urged the Commission to set his application for a comparative hearing. Pet. App. 8a-9a.

c. In December 1984, the FCC approved Faith Center's application for permission to assign its broadcast license to petitioner under the distress sale program. Pet. App. 113a-129a; see *Faith Center, Inc.*, 99 F.C.C.2d 1164

(1984).[10] The Commission rejected Shurberg's constitutional challenge to the minority distress sale program as "without merit." Pet. App. 122a. In support of that program, the Commission cited its findings of "an acute underpresentation of minorities among the owners of broadcast stations and that views of racial minorities were inadequately represented in the broadcast media," *ibid.*, together with the Commission's previous observations "that increasing minority ownership of broadcast stations would result in diversity of control of a limited resource, the broadcast spectrum, and would result in a more diverse selection of programming for the entire viewing and listening public." *Id.* at 122a-123a.

The Commission also found support in decisions of the District of Columbia Circuit, such as *West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601, 609-611 (1984), cert. denied, 470 U.S. 1027 (1985), which have "repeatedly defined as an important public interest objective the participation of heavily underrepresented minorities in the ownership and operation of broadcast stations." Pet. App. 123a. And the Commission recognized that Congress,

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[10] The FCC rejected Shurberg's argument that he was entitled to a comparative hearing against Faith Center's renewal application. Pet. App. 117a-122a. The Commission acknowledged as a "close question" the issue whether "the public interest in permitting competing applications to be filed, as articulated in [*New South Media Corp.* v. *FCC*, 685 F.2d 708 (D.C. Cir. 1982)], outweighs the goals of [its] minority ownership policies in this case." Pet. App. 121a. The Commission determined, however, that its

> minority ownership policies, as reflected here in the distress sale proposal, are sufficiently important to warrant maintaining Faith Center's renewal application in hearing status, protected from competing applications, for a sufficient additional time to permit us to consider the pending application to assign the license to [petitioner].

Ibid.

in requiring that the Commission incorporate "significant preferences for minority applicants * * * into any random selection licensing scheme," has "reaffirmed the importance of fostering minority ownership of broadcast stations." *Ibid.*; see 47 U.S.C. 309(i).

d. Shurberg then filed a petition for review of the Commission's order in the District of Columbia Circuit. Meanwhile, on January 23, 1985, Faith Center and petitioner closed the distress sale. Petitioner brought the Channel 18 license and station assets for $3.1 million; the fair market value of the license and station assets had been appraised at $6,520,000. See Pet. App. 11a, 30a n.17; J.A. 1064.

2. *Intervening Legal and Administrative Proceedings*

a. The disposition of Shurberg's petition for review was delayed for several years because of events concerning related proceedings. In August 1985, after briefing in Shurberg's case had been completed, the court of appeals held that the FCC had exceeded its statutory authority by adopting a female preference in comparative licensing proceedings. *Steele* v. *FCC*, 770 F.2d 1192 (D.C. Cir. 1985). On October 31, 1985, however, the court of appeals, sitting en banc, granted a private party's petition for rehearing in the *Steele* case, vacated the panel's opinion, and, on November 22, ordered the parties to file supplemental briefs on the pertinent statutory and constitutional issues. In September 1986, the FCC filed a supplemental brief in the *Steele* case, stating that "the Commission believes that both [its] gender and racial preference schemes conflict with equal protection standards under the Constitution." Brief for FCC on Rehearing En Banc at 14, *Steele* v. *FCC*, *supra*. In light of its position, the FCC asked the court of appeals to remand the case to the Commission for further

proceedings to explore the underpinnings of its policies. See Appendix to Brief for FCC on Rehearing En Banc, *Steele* v. *FCC*, *supra*.

On October 9, 1986, the court of appeals granted the FCC's motion for remand in the *Steele* case. And in December 1986, the Commission initiated a separate non-adjudicatory inquiry proceeding to consider the validity of its female and minority ownership policies. See *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 F.C.C. Rcd 1315 (1986) (MM Dkt. No. 86-484), modified, 2 F.C.C. Rcd 2377 (1987). The Commission explained that, in light of recent developments in the law, it needed to reconsider both the factual and legal bases for the ownership policies. See 1 F.C.C. Rcd at 1317-1318.

b. As a result of the remand in the *Steele* case, together with the related developments, the FCC asked the court of appeals to remand the record in the instant case in order for the Commission to reexamine its distress sale policy. The court of appeals granted that motion in June 1987, and remanded the case to the FCC. Pet. App. 11a. On remand, the FCC held the case in abeyance pending the outcome of its inquiry proceeding reexamining its minority ownership policies.

c. On December 22, 1987, the President signed into law the Continuing Appropriations Act for the Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329, which, among other things, appropriated funds for FCC salaries and expenses for that fiscal year. That law provided that

> none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the [FCC] with respect to comparative licensing, distress sales

> and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended * * *, which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

101 Stat. 1329-31.

The FCC complied with that legislation and on January 14, 1988, closed its inquiry proceeding and reinstated its policy of awarding gender and racial preferences in comparative licensing proceedings, and of preferring minority-controlled applicants in distress sales. See, *e.g.*, *Faith Center, Inc.*, 3 F.C.C. Rcd 868 (1988).

d. Shurberg then asked the court of appeals for expedited resolution of the pending case. The court of appeals agreed to render a decision "in the normal course of business." Pet. App. 13a.[11]

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[11] In October 1988, while the case was pending before the court of appeals, several of petitioner Astroline's creditors filed an involuntary petition in bankruptcy against the firm under 11 U.S.C. 701 *et seq.* *In re: Astroline Communications Co.*, No. 2-88-01124 (Bankr. D. Conn. Oct. 31, 1988). The creditors claimed that Astroline owed them more than $11.6 million, that Astroline was seriously delinquent in making payments on those debts, that Astroline had admitted that it was generally not paying its debts on time, and that, with limited exceptions, Astroline had suspended all payments to its program suppliers. See Petition 2, *In re: Astroline Communications Co.*, No. 2-88-01124 (Bankr. D. Conn. Oct. 31, 1988). In December 1988, Astroline elected, under 11 U.S.C. 706, to convert the proceeding into a voluntary reorganization under Chapter 11 of the Bankruptcy Code. See Order, *In re: Astroline Communications Co.*, No. 2-88-01124 (Bankr. D. Conn. Dec. 1, 1988).

Astroline's bankruptcy proceeding remains pending; Astroline has continued to operate Channel 18 as a "debtor in possession." Astroline has also informed the Commission that its financial condition and future operation of the station are uncertain. See *Arnold L. Chase*, 4 F.C.C. Rcd 5085 (1989).

3. *The Court of Appeals decision*

A divided court of appeals struck down the Commission's minority distress sale program as unconstitutional. Pet. App. 1a-112a. In a brief per curiam opinion, the panel majority held that this program "unconstitutionally deprives Alan Shurberg and Shurberg Broadcasting of their equal protection rights under the Fifth Amendment because the program is not narrowly tailored to remedy past discrimination or to promote programming diversity." *Id.* at 2a. The court accordingly remanded the case to the Commission for further proceedings. Judges Silberman and MacKinnon, who comprised the panel majority, each filed separate opinions concurring in the judgment. See *id.* at 3a-52a (Silberman, J.); *id.* at 53a-69a (MacKinnon, J.). Chief Judge Wald filed a dissenting opinion. See *id.* at 70a-112a.[12]

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[12] As a threshhold matter, Judge Silberman concluded that the Commission had properly applied the governing statute and regulations (47 U.S.C. 307(c); 47 C.F.R. 73.3516(e)) in concluding that Shurberg was not entitled to a comparative hearing. See Pet. App. 13a-17a. Neither Judge MacKinnon nor Chief Judge Wald disagreed expressly with this conclusion.

In addition, Judge Silberman concluded that the Commission had not exceeded its statutory authority under the Communications Act of 1934 when it adopted the minority distress sale policy. See Pet. App. 17a. Judge MacKinnon apparently agreed with this conclusion. See *id.* at 56a ("the case has leveled down to a constitutional attack on the distress sale policy"). Chief Judge Wald addressed the constitutional issue in light of the majority's decision to do so. See *id.* at 72a-73a n.3.

a. Judge Silberman identified the "constitutional issue [as] whether or not the distress sale policy, by creating a preference for minority purchasers, violates the equal protection component of the Fifth Amendment." Pet. App. 18a. After reviewing this Court's recent pertinent decisions concerning government-sponsored minority preferences,[13] he extracted several guiding principles, including: (1) such preferences "are constitutionally permissible under certain limited circumstances, but they may not be based on the desirability *per se* of achieving racial balance or proportional representation of minorities in selected institutions," *id.* at 22a; (2) the "nature of the evidence required to establish the existence of prior discrimination varies with the authority of the governmental body imposing the remedial preference," *id.* at 22a-23a; and (3) "[a]ssuming the factual predicate for remedial action by any governmental body has been established, a reviewing court must still ensure that the use of race is narrowly tailored to the remedial purpose." *Id.* at 23a.

In Judge Silberman's view, the Commission sought to justify its minority distress sale program "both as a means to foster diverse programming and as a remedy for past discrimination." Pet. App. 25a. Turning first to the latter justification, he found that "[n]either Congress nor the FCC ever found any evidence to link minority 'underrepresentation' to discrimination by the FCC or to particular discriminatory practices in the broadcasting industry," *id.* at 27a, and that, in any event, the Commission's program "does not conform to the stricture of the Constitution because it is not narrowly tailored to remedy

[13] *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980); *Regents of the University of Cal.* v. *Bakke*, 438 U.S. 265 (1978).

past discriminaton." *Id.* at 29a. Accordingly, he concluded that the remedial justification does not support the Commission's program.

Turning to the programming diversity rationale, Judge Silberman rejected the proposition that such an interest, in the context of this case, is sufficiently compelling to support the race-based preference. See Pet. App. 36a-41a. He noted, among other things, that the Commission, in recently abandoning the "fairness doctrine," determined "that there no longer is an inadequate diversity of viewpoints in television programming." *Id.* at 40a. Judge Silberman concluded that, in any event, the Commission's distress sale policy was not narrowly tailored to achieve that goal. In his view, "[a]s a means to promote diverse programming, the distress sale policy rests on the questionable premise that minority ownership will by itself lead to minority programming (or programming that might be thought to have a minority perspective)." *Id.* at 41a-42a. Furthermore, he rejected the contention that Congress had made sufficient findings that support a nexus between program diversity and minority ownership, see *id.* at 45a-47a, and also concluded that the Commission's policy could not be upheld under the framework outlined by Justice Powell in *Regents of the University of Cal.* v. *Bakke*, 438 U.S. 265, 315-319 (1978). See Pet. App. 47a-49a.

b. Judge MacKinnon concurred in the judgment, concluding that the Commission's minority distress sale program "does not satisfy the 'narrowly tailored' requirement of equal protection analysis." Pet. App. 54a.[14] In his view,

[14] For that reason, Judge MacKinnon chose not to reach the question "whether either promoting programming diversity or remedying societal discrimination are a sufficiently compelling governmental interest to support the use of government sponsored minority preference programs." Pet. App. 59a-60a n.11.

"the program is open-ended in that circumstances may cause it to be applied to any broadcast licensee without regard to any past discrimination." *Id.* at 61a. As a result, the Commission's program impermissibly "deprive[s] all nonminorities of their right to equal access to a broadcast license." *Ibid.* Similarly, he found that "because the distress sale program has no limits of any character it is not sufficiently tailored to the goal of promoting programming diversity." *Id.* at 63a.[15] Accordingly, Judge MacKinnon concluded that the program "unduly burdens innocent nonminorities." *Id.* at 66a.

c. Chief Judge Wald dissented, concluding overall that the "majority's invalidation of the Commission's ten-year old minority distress sale program * * * impermissibly overturns a considered congressional judgment as to the appropriate means of assuring diversity of viewpoint over the national airwaves." Pet. App. 70a. After reviewing the development of that program, as well as Congress's express endorsements of the Commission's efforts to diversify media control through programs to encourage minority ownership and control, Chief Judge Wald found that the distress sale program is "a deliberately chosen congressional policy." *Id.* at 79a. And, in light of the current case law, she concluded that the policy "is a constitutional means of pursuing Congress' objective: ensuring greater diversity in programming." *Ibid.* She accepted as both reasonable and supported by congressional factfinding the connection between minority ownership

[15] Disagreeing with Judge Silberman, Judge MacKinnon found that Congress had sufficiently determined that there is a nexus between minority ownership and programming diversity. See Pet. App. 64a-66a. He agreed, however, with Judge Silberman's further conclusion that such a congressional determination does not insulate the Commission's distress sale program from the applicable standard of judicial review—"strict scrutiny." *Id.* at 66a.

and diverse programming. See *id.* at 92a-100a. Finally, Chief Judge Wald disputed the conclusion that the Commission's program impermissibly burdens innocent nonminorities, finding that "the near-monopoly exercised by nonminorities over broadcast media—they control approximately 98% of all broadcast licenses—and the very limited circumstances in which the distress sale policy can be invoked, suggest that the burden the policy places on nonminority applicants is acceptable." *Id.* at 109a.

d. On June 16, 1989, a petition for rehearing, together with a suggestion of rehearing en banc, were denied. Pet. App. 143-154a; *id.* at 155a-160a. Chief Judge Wald, joined by Judges Robinson, Mikva, Edwards, and Ruth B. Ginsburg, dissented from the denial of rehearing en banc. *Id.* at 157a-160a.

ARGUMENT

This Court is well aware that government-sponsored racial preference programs, like the Federal Communications Commission's minority distress sale program, may involve important and sensitive questions of public policy and constitutional law. See, *e.g.*, *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980); *Regents of the University of Cal.* v. *Bakke*, 438 U.S. 265 (1978). Several considerations, however, suggest that further review of this particular case is not warranted at this time. Accordingly, we submit that review should be denied.

First, petitioner's current precarious financial status makes this case an unsuitable vehicle for addressing the broad legal issues surrounding the validity of the Commission's distress sale program that petitioner raises. See Pet.

11-27.[16] Given its pending bankruptcy proceeding, see note 11, *supra*, petitioner might well not be able to hold the license for Channel 18, regardless of whether the distress sale at issue were ultimately upheld. Rather, an appointed receiver or trustee in bankruptcy, acting on behalf of creditors, might well step in, and under the Commission's settled practice, could be permitted to sell or transfer "the bankrupt's license [if] the transaction will not unduly interfere with the FCC mandate to insure that broadcast licenses are used and transferred consistently with the Communications Act." *LaRose* v. *FCC*, 494 F.2d 1145, 1148 (D.C. Cir. 1974); see *In re Applications of Channel 64 Joint Venture* 3 F.C.C. Rcd 900 (1988); *D.H. Overmyer Telecasting Co.*, 94 F.C.C.2d 117 (1983). Accordingly, the outcome of the pending bankruptcy action could well deprive this case of any significance with respect to petitioner's holding the license.[17]

Second, the decision below, is the first court of appeals decision to apply this Court's analytical framework in *City of Richmond* v. *J.A. Croson Co.*, *supra*, to a government-sponsored program involving a racial preference. Cf. *United States* v. *City of Chicago*, 870 F.2d 1256, 1261 (7th Cir. 1989). Thus, to the extent petitioner seeks this Court's review of the court of appeals' treatment of that decision

[16] Moreover, the distress sale program, since its inception in 1978, has not played a major role in connection with the transfer and sale of broadcast licenses. See note 2, *supra*.

[17] In addition, as matters now stand, petitioner will not automatically be prevented from holding the broadcast license. To the contrary, under the court of appeals' mandate, the Commission must reopen the administrative proceedings to consider the interests of all relevant parties, including petitioner, in the license for Channel 18.

as applied to a particular factual setting, see, *e.g.*, Pet. 12, 15, 17-18, 23, that request may well be premature pending further illumination in the courts of appeals.

Third, petitioner points out (Pet. 11, 22-23) that the court of appeals' decision may not be squared with either *Winter Park Communications, Inc.* v. *FCC*, *supra*, decided by a different panel of the court of appeals, see note 6, *supra*, or the District of Columbia Circuit's earlier decision in *West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (1984), cert. denied, 470 U.S. 1027 (1985). These cases pose no direct conflict, as each involved a distinct minority ownership program.[18] Nevertheless, they do rely on conflicting rationales and applications of this Court's recent decisions. In *Winter Park* and *West Michigan*, the court of appeals upheld the constitutionality of the FCC's policy of awarding a qualitative enhancement for minority ownership in comparative licensing proceedings. And in so holding, both the *Winter Park* and *West Michigan* courts embraced analyses expressly rejected by the majority below to strike down the FCC's minority distress sale program. See *Winter Park*, 873 F.2d at 352-355; *West Michigan*, 735 F.2d at 609-611.

That intra-circuit conflict does not call for further review by this Court at this time. The Court has long followed the prudential practice of not stepping in to resolve such disputes. *E.g.*, *Davis* v. *United States*, 417

[18] Under the FCC's minority distress sale policy, the policy at issue in this case, the Commission permits a limited category of licenses to be transferred only to minority-controlled firms. By contrast, under the FCC's policy of awarding a qualitative enhancement for minority ownership in comparative licensing proceedings, the policy at issue in *Winter Park* and *West Michigan*, the Commission takes minority status into account as one factor in a multi-factor comparative process.

U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). And the current status of the District of Columbia Circuit suggests that a departure from this Court's practice is especially unwarranted in this case. That circuit currently has three judgeships vacant; those vacancies are expected to be filled in the foreseeable future. Accordingly, once the court of appeals has its allotted complement of judges, and if issues surrounding the FCC's racial preference policies persist, the entire court of appeals will be able to resolve any inconsistencies among panel decisions.

Finally, as is apparent from the background of this case, see, *e.g.*, pp. 7-8, *supra*, both the FCC and the Congress have paid particular attention to and have closely monitored developments in this evolving area of law and public policy. The current state of affairs, which mandates the FCC's continued use of racial preference policies (subject, of course, to judicial review), stems from Congress's reenactment of the annual appropriations provision. See pp. 7-8 & note 7, *supra*. Accordingly, as the law now stands, Congress must reconsider the subject matter by the close of fiscal year 1990, and in fact has recently held hearings to examine the status and soundness of the FCC's minority ownership policies. See *Hearing on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation*, 101st Cong., 1st Sess. (Comm. Print Sept. 15, 1989) (unpublished); see also note 7, *supra*. In these circumstances, where Congress is revisiting this complex and sensitive area of the law, intervention by this Court at this time is not necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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